## RECENT CASES

BANKRUPTCY—PROVABILITY OF CLAIM FOR DAMAGES FOR LOSS OF FUTURE RENTALS—Two landlords filed claims in bankruptcy for damages for loss of future rentals which were to be measured by the difference between rental value and rent reserved under the respective leases. The latter contained indemnity clauses of the following nature: In Case No. 505 it was provided that upon lessee's bankruptcy the lessor might enter and relet as agent for the lessee, the lessee covenanting to pay each month to the lessor the deficit accruing between rental reserved in the lease and the rentals actually collected. In Case No. 506, upon lessee's bankruptcy, lessor had a right to enter and terminate the lease, in which event the lessee covenanted to indemnify the lessor against all rental losses incurred during the balance of the term. *Held* (in both cases), that the claim for damages for loss of future rentals was not provable. *Manhattan Properties, Inc. v. Irving Trust Company, Trustee* (No. 505); *Samuel R. Brown v. Irving Trust Company, Trustee* (No. 506), U. S. Sup. Ct., February 5, 1934.

The Supreme Court, in expressly rejecting [1] the contention of the applicability of Section 74 (a) of the *Bankruptcy Act* [2] restricted claims for future rentals permitted by that section to the limited field of extension and composition agreements sanctioned thereby. Recognition by the Court, in previous cases, that the fact that a claim is contingent at the time of the filing of the petition in bankruptcy does not of itself make the claim non-provable,[3] that insolvency may work an anticipatory breach of a contract obligation,[4] and that damages for loss of future rentals are sufficiently ascertainable for provability in receiverships,[5] might have paved the way for allowing the proof of a claim for damages for loss of future rentals under Section 63 of the Act.[6] Although the Court by way of *dictum* has stated that lease law is *sui generis* and that the doctrine of anticipatory breach has no place therein,[7] in the principal cases it affirmatively recognized [8] the applicability of that doctrine. Certainly damages

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[1] Principal case at 8.

[2] 47 STAT. c. 204 § 1 (1933). See Wyzanski, *The Effect of the 1933 Bankruptcy Legislation Upon the Rights of a Landlord* (1933) J. NAT. ASS'N REF. BANKRUPTCY 107.

[3] Maynard v. Elliott, 283 U. S. 273, 51 Sup. Ct. 390 (1931) (claim against bankrupt as endorser upon a note payable after his adjudication held provable).

[4] Central Trust Company v. Chicago Auditorium Ass'n, 240 U. S. 581, 36 Sup. Ct. 412 (1916) (executory contract for baggage and livery privileges).

[5] Wm. Filene's Sons v. Weed, 245 U. S. 597, 38 Sup. Ct. 211 (1918); Gardiner v. Wm. S. Butler & Co., 245 U. S. 603, 38 Sup. Ct. 214 (1918). See also Leo v. Pearce Stores, 54 F. (2d) 92 (E. D. Mich. 1932).

[6] 30 STAT. 562 (1898), 44 U. S. C. A. § 103 (1927).

[7] Central Trust Co. v. Chicago Auditorium Ass'n, *supra* note 4, at 590, 36 Sup. Ct. at 414. See also Wells v. Twenty-First St. Realty Co., 12 F. (2d) 237 (C. C. A. 6th, 1926). It has been contended that the theory upon which this *dictum* rests is based upon a *misconception* of Coke. See Radin, *Claims for Unaccrued Rent in Bankruptcy (Concluded)* (1933) 22 CALIF. L. REV. 1.

[8] Principal case at 9: ". . . there is some color for the claim that bankruptcy is an anticipatory breach of the lease contract, entailing a damage claim against the estate . . .". Accord: Leo v. Pearce Stores, *supra* note 5; General Tire & Rubber Co. v. General Tire & Sales Co., 93 Pa. Super. 173 (1927). The amendment of the Bankruptcy Act so as to make bankruptcy an anticipatory breach of all executory contracts, including leases, has been suggested. McLaughlin, *Amendment of the Bankruptcy Act* (1927) 40 HARV. L. REV. 583, 605. Prof. Williston states that the doctrine of anticipatory breach will not, though it logically should, be applied to leases. 3 WILLISTON, CONTRACTS (1920) §§ 1328-1329. On the other hand, the applicability of anticipatory breach to bankruptcy has been denied on the ground that there need be an acceptance of an anticipatory breach; and if bankruptcy constitutes a breach, the acceptance must necessarily post-date the filing of the petition and should not therefore be a provable debt under § 63 of the Act. Schwabacher and Weinstein, *Rent Claims in Bankruptcy* (1933) 33 COL. L. REV. 213, at 232.

for loss of future rentals are no more difficult of ascertainment than damages for breach of a contractual obligation to be performed in the future,[9] and the Court in the principal cases seemed to be rejecting one of the long-followed rules of *In re Roth & Appel*[10] when it intimated that damages for loss of future rentals might be provable under a properly drawn lease.[11] The instant decision can be rested solely upon the effect of the covenants involved, since they do not create any obligation upon the lessee until the lessor exercises his option to enter and terminate the lease. This must necessarily occur after the date of the filing of the petition, and any claim under those covenants cannot therefore be proved under Section 63 of the Act.[12] Fortunately, in some measure of fairness to landlords who do not insist, as did those in the instant cases, in retaining an option either to maintain or to terminate the lease as best suits their interests, the principal cases leave open the way to permit provability of claims for damages for loss of future rentals under leases which provide that bankruptcy shall *ipso facto* terminate them and that the lessee is thereupon bound, not for rent, but for either liquidated or determinable damages.[13]

BANKS AND BANKING—EFFECT OF AN ASSIGNMENT BY THE RECEIVER FOR AN INSOLVENT BANK OF A JUDGMENT OBTAINED BY HIM AGAINST A SHAREHOLDER FOR THE AMOUNT OF THE LATTER'S STATUTORY LIABILITY—The receiver for an insolvent bank, in pursuance of statutory authority,[1] reduced to judgment an assessment made by him against the shares of the defendant.[2] He subsequently sold, with the court's approval, all of the "remnant assets" of the bank, including the above judgment, to the plaintiff, who sought to enforce the judgment against the shareholder.[3] *Held,* that the statutory liability of a shareholder was not an asset of the bank and that the judgment could not be enforced for more than the value plaintiff paid the receiver for it. *Roe v. King,* 251 N. W. 81 (Iowa 1933).

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[9] See Central Trust Co. v. Chicago Auditorium Ass'n, *supra* note 4; Maynard v. Elliott, *supra* note 3. See also *In re* National Credit Clothing Co., 66 F. (2d) 371 (C. C. A. 7th, 1933) (breach occurred before bankruptcy); Schwabacher and Weinstein, *supra* note 8, at 236.

[10] 181 Fed. 667 (C. C. A. 2d, 1910). The proposition was there established that the amount of a claim for damages for loss of future rentals was subject to so many diverse contingencies as to be impossible of liquidation.

[11] Principal case at 8, 10. See Note (1933) 47 HARV. L. REV. 488, at 492 *et seq.*

[12] See principal case at 9. Inasmuch as the covenant of indemnity does not become effective until after the filing of the petition, it cannot be the basis of a provable claim. Under New York law similar covenants have been construed as not giving rise to a cause of action until the time stipulated for indemnification. See Hermitage Co. v. Levine, 248 N. Y. 333, 162 N. E. 97 (1928).

[13] Principal case, at 8 *et seq.* See also Rogers v. United Grape Products, 2 F. Supp. 70 (W. D. N. Y. 1933); Note (1933) 47 HARV. L. REV. 488, at 492 *et seq.* Not to permit the provability of damages for loss of future rentals would lead to inequity. See Douglas and Frank, *Landlords' Claims in Reorganizations* (1933) 42 YALE L. J. 1003, at 1007.

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[1] IOWA CODE (1931) §§ 9251-9254.

[2] The receiver did not obtain the judgment by bringing an action against the shareholder individually for the amount of the statutory liability. The receiver merely obtained an order of the court assessing all of the bank's shareholders 100% on their shares. As a part of the assessment, and when the same was made, the court entered judgment thereon against the shareholders in favor of the receiver. The judgment against the defendant was for $4,500.

[3] The face value of the assets, which plaintiff purchased for only $2,750, exceeded $30,000.

By the overwhelming weight of authority, a shareholder's statutory liability [4] cannot, in the absence of express statutory authority, be enforced by a receiver, assignee, or trustee of an insolvent bank.[5] But where, as in the instant case, the statute provides that the receiver is a proper party to enforce the superadded liability, some courts have held that it may be assigned as an ordinary asset of the bank.[6] About an equal number of courts, however, have regarded it as a claim *sui generis,* enforceable for the sole benefit of the bank's creditors and only by the receiver.[7] The instant case went further than any of the previously decided cases in restricting the enforcement of the additional liability, since the claim had been reduced to a judgment in the manner provided by statute, and it was the *judgment* rather than the bare claim for statutory liability which the receiver assigned.[8] Since the statutory provisions were such that the court might have reached either conclusion without doing violence to the express terms,[9] the problem of determining the validity of the assignment resolved itself into one of policy rather than into one merely of statutory construction. The main argument by courts which forbid the assignment of the claim for liability is that the creditors get no benefit from the profit which the assignee makes, and accordingly the shareholder should not suffer this additional extraordinary liability. But by prohibiting the assignment of the shareholder's liability, it would seem that the court was defeating the very object which the statute was designed to secure, namely, the creation of a fund for the payment of the creditors.[10] If a receiver were permitted to dispose of the liabilities which have proved to be "uncollectible" for whatever price they might bring, some gain would result to the individual creditors which they would not otherwise have realized—at least the benefit of immediate payment. Furthermore, the existence of the possibility of an assignment may, in some instances, furnish a stimulus to the shareholder for more prompt settlements or compromises with the receiver, since experience has shown that the purchaser of the liability is usually more diligent

[4] The shareholder's liability, as used throughout this comment, refers only to the superadded liability, equal, in most cases, to the par value of the shares, which many of the states and the federal government have, by statute, imposed upon the shareholders of insolvent banking corporations.

[5] Williamson v. American Bank, 115 Fed. 793 (C. C. A. 4th, 1902); Wincock v. Turpin, 96 Ill. 135 (1880); Runner v. Dwiggins, 147 Ind. 238, 46 N. E. 580 (1897); McLaughlin v. Kimball, 20 Utah 254, 58 Pac. 685 (1899). *Contra:* Moore v. Ripley, 106 Ga. 556, 32 S. E. 647 (1899); Smathers v. Western Carolina Bank, 135 N. C. 410, 47 S. E. 893 (1904); Barton Nat. Bank v. Atkins, 72 Vt. 33, 47 Atl. 176 (1899); Wilson v. Book, 13 Wash. 676, 43 Pac. 939 (1896). The superadded liability is not a corporate asset, but a secondary or collateral liability, flowing directly to and capable of being enforced in favor of the corporate creditors only. Tiger Shoe Mfg. Co.'s Trustee v. Shanklin, 125 Ky. 715, 102 S. W. 295 (1907); State v. Citizens' State Bank of Royal, 118 Neb. 337, 224 N. W. 868 (1929); 6 THOMPSON, CORPORATIONS (3d ed. 1927) 715.

[6] Waldron v. Alling, 73 App. Div. 86, 76 N. Y. Supp. 250 (1902); *cf.* Cobe v. Hackney, 83 Kan. 306, 111 Pac. 458 (1910) (suit on a note given shareholder in settlement of his statutory liability); Schaberg v. McDonald, 60 Neb. 493, 83 N. W. 737 (1900) (shareholder held not a proper party to question validity of assignment); Houston Nat. Exch. Bank v. Chapman, 263 S. W. 929 (Tex. Civ. App. 1924) (assignee had paid in full the debts of the insolvent bank).

[7] Andrew v. State Bank of Swea City, 214 Iowa 1339, 242 N. W. 62, 82 A. L. R. 1280 (1932); State v. Kelly, 141 Okla. 36, 289 Pac. 726 (1930).

[8] *Cf.* Cobe v. Hackney, *supra* note 6.

[9] The pertinent statutory provisions are contained in IOWA CODE (1931) §§ 9251, 9253. Section 9251 provides: "All stockholders of . . . banks shall be individually liable to creditors of such corporation . . . to an amount equal to their respective shares." Section 9253 provides "The assignee or receiver of any such corporation . . . may maintain an action in equity to determine the liability of the stockholder . . .".

[10] The instant case, in limiting the assignee's recovery to the amount paid by him to the receiver for the judgment, has the practical effect of prohibiting an assignment, since the assignee is precluded from any possibility of gain.

and persevering in his efforts to enforce the liability than is the receiver.[11] At any rate, a defaulting shareholder is not the proper party to challenge the receiver's assignment of the superadded liability;[12] that transaction, being exclusively for the benefit of the creditors, is one which only the creditors should be permitted to attack.

BONDS—GOLD CLAUSE—RIGHT TO DEMAND FULL VALUE OF GOLD OBLIGATION CALCULATED IN MONEY CIRCULATING AT TIME OF PAYMENT—The plaintiff held a bearer bond of the defendant, issued in 1928. The bond provided, *inter alia*,[1] that the obligation was payable "in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st September, 1928." After some difficulty in respect to payment of coupons, the plaintiff took out a summons for construction of the bond.[2] *Held*, that the obligation of the debtor was to pay interest and principal in legal tender, the amount of such payment to be the money sufficient at the time of payment to purchase the quantity of gold contained in the coins specified. *In re Société Intercommunale Belge d'Electricité, Feist v. Société*, N. Y. L. J., Jan. 5, 1934, at 61 (House of Lords), *rev'g* [1933] Ch. 684.

This decision was achieved apparently only after some straining on the part of the court. On the whole, strict legal theory justifies it.[3] Close analysis, however, seems to indicate that the "reasonable" construction sought to be placed upon the words of the contract would not in fact fulfill the real desire of the parties. Reasonably interpreted, their wish seems to have been to prevent payment of the obligation in a medium depreciated, not in terms of gold, but in terms of commodities generally, since that is what the investor would wish to buy. The phenomenon to be feared, then, was an inflation, and a rising price level. Paradoxically, abandonment of the gold standard was accompanied in this case by a *fall* in prices.[4] The anticipated event did not occur;[5] and the plaintiff's act in invoking the gold clause was simply an attempt to reap from monetary fluctuation a profit unearned and uncontemplated.[6] Most important,

[11] This same fact, however, has also been stated as a reason for *prohibition* of the assignment of the liability. In Andrew v. State Bank of Swea City, *supra* note 7, the court expressed the fear that in the hands of an assignee the statutory liability might "become the basis of private speculation or oppression". But on the other hand, allowing an assignment may serve a useful purpose in facilitating collection of the liability. Waldron v. Alling, *supra* note 6 (receiver in Washington assigned statutory liability of a shareholder living in New York).

[12] Schaberg v. McDonald, *supra* note 6.

[1] The bond contained a number of conflicting provisions which obscured the exact nature of the obligation. See the statement of facts, and the opinion of Farwell, J., [1933] Ch. 684, 687 ff. See also (1933) 81 U. OF PA. L. REV. 995.

[2] Specifically, he wanted to obtain the value of the gold necessary to pay the amount of the coupon due, £2.15.00.

[3] See generally, CONTRACTS RESTATEMENT (Am. L. Inst. 1932) §§ 226-236; 2 WILLISTON, CONTRACTS (1924) c. xxi.

[4] According to the United Kingdom Board of Trade averages, the composite index number of commodity prices in March, 1932, was roughly 75, using September, 1928, the time of issue, as the base, 100. Essentially, this means that the consumer could buy in 1932 for $3 just as much as he could have bought for $4 in 1928. THE ECONOMIST, Jan. 13, 1934, at 53, prints practically the same figures.

[5] In 1932, the £2.15.00 of the coupon would purchase as much in commodities as would have been bought by £3.12.00 in 1928. The investor, then, was being paid more than the parties contemplated he should receive.

[6] In March, 1932, the pound had depreciated about 30% in gold value. Under this decision, the investor would be paid about £3.06.00 in 1932 currency. This, in turn, represents £4.02.00 in currency of 1928—a return still more in excess of what the parties contemplated.

it was profit at the expense of the debtor, already oppressed by his obligation to pay a fixed sum in a monetary unit more difficult to obtain than formerly. Relief of the debtor class from such oppression has been increasingly recognized as desirable in the United States;[7] considerations such as these, although perhaps not strictly legalistic, may, and ought to, weigh in the interpretation of such a clause in this country. Extant precedent[8] differs in that it was announced in respect to clauses different from those found in this and most contemporary obligations,[9] and further in that the situation there involved was a genuine inflation, marked by devaluation of the circulating monetary medium.[10] Every pertinent factor fosters the hope that the courts will decide against literal enforcement of a gold clause; but it is difficult to foresee how they will reconcile their decisions with the firmly entrenched rules for determining the intention of contracting parties.

CONFLICT OF LAWS—FULL FAITH AND CREDIT—BINDING EFFECT IN SOUTH CAROLINA OF GEORGIA SUPPORT ORDER—A domiciliary of Georgia obtained a decree of total divorce from his wife. He was ordered to make a lump sum payment for the "permanent" support of his minor child, also a domiciliary of Georgia.[1] Under Georgia law, this decree forever determined the father's obligation to support the child.[2] Custody of the child was awarded to the mother, and the child acquired a domicile in South Carolina. The money awarded under the support order had been exhausted. The child as plaintiff obtained service upon her father in South Carolina and recovered an award for additional support.[3] *Held,* (two justices dissenting) that the award was erroneous because it denied full faith and credit to the Georgia decree. *Yarborough v. Yarborough,* 54 Sup. Ct. 181 (1933).

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[7] See generally, Note (1933) 82 U. OF PA. L. REV. 261; Corwin, *Moratorium over Minnesota* (1934) 82 U. OF PA. L. REV. 311; speech by President Roosevelt on May 7, 1933, printed in full in the N. Y. Times, May 8, 1933, at 1; remarks by Rep. McGugin on H. R. 161, May 27, 1933, 77 CONG. REC. 4524 (1933); statement by President Roosevelt on interest, N. Y. Times, Feb. 8, 1934, at 1. This note does not pretend to consider constitutional questions which might arise. See Post and Willard, *The Power of Congress to Nullify Gold Clauses* (1933) 46 HARV. L. REV. 1225; Johnson, *Constitutional Limitations and the Gold Standard* (1933) 67 U. S. L. REV. 187, 239.

[8] The leading cases are Bronson v. Rodes, 74 U. S. 229 (1868); Butler v. Horwitz, 74 U. S. 258 (1868); Bronson v. Kimpton, 75 U. S. 444 (1869); Trebilcock v. Wilson, 79 U. S. 687 (1871).

[9] The clauses involved in the cases *supra* note 8 were promises to pay bullion; by way of contrast, the phrasing of the clause in the instant case is typical of modern usage.

[10] All the important cases were decided in the post-Civil War, greenback, inflation period. Of importance is the fact that the government itself discriminated against the currency in circulation. See Nebolsine, *The Gold Clause in Private Contracts* (1933) 42 YALE L. J. 1051.

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[1] Before the final decree of divorce, the parents had separated, and custody of the child had been awarded to her mother who was then temporarily residing in North Carolina. But these facts were not sufficient to alter the general rule that the domicile of an infant is that of the father: GOODRICH, CONFLICT OF LAWS (1927) §§ 33, 34; GA. CODE ANN. (Michie, 1926) § 2184. Nor may the child voluntarily change his domicile: *id.* § 2187; Jackson v. Southern, *etc.* Co., 146 Ga. 453, 91 S. E. 481 (1917).

[2] GA. CODE ANN. (Michie, 1926) § 2981. A decree under this sections is not subject to future revision, even though, as in the principal case, it is a consent decree: Coffee v. Coffee, 101 Ga. 787, 28 S. E. 977 (1897).

[3] Proceedings were commenced by attachment of his real estate located in South Carolina. Later, he was personally served within this state.

Generally, courts of one state must give full faith and credit[4] to the *final* judgments of a sister state.[5] Exceptions are recognized when the court of rendition lacked jurisdiction;[6] when its judgment was obtained by fraud;[7] or where it purports to enforce a "penal" claim.[8] However, that the nature of the claim on which the judgment is based is repugnant to the public policy of the forum will not justify a refusal of recognition.[9] While the precise question presented in the instant case is one of first impression, it is sufficiently analogous to marital status decisions—*i. e.*, cases involving divorce, alimony, and support—to be governed by the same general principles. In those cases, domicile is a factor of prime importance: a decree rendered in the state of the matrimonial domicile of the parties must be given faith and credit,[10] unless it is subject to subsequent revision.[11] Since Georgia was the matrimonial domicile of the parties in the instant case, and since its decree was final, the Supreme Court correctly decided that South Carolina must accord credit to it. Such prior decree would not ordinarily prevent another state from awarding a support order, for it appears that Georgia is the only state in which, by statute, such judgment precludes its courts from thereafter imposing liability for support of a minor child upon the father.[12] The dissenting justice ably argued that the status of parent and child is a matter of such peculiar interest to government that no state should, by the intervention of a foreign judgment, be precluded from defining and enforcing the obligations flowing from that status, when such child becomes domiciled within its borders. Such reasoning is a sharp departure from the traditions of the concept of domicile as affecting the mandatory recognition of prior decrees.[13] As an abstract matter of social policy this view may appear

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[4] U. S. CONST., Art. 4, § 1.

[5] Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544 (1901); Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129 (1913); Bates v. Bodie, 245 U. S. 520, 38 Sup. Ct. 182 (1918); GOODRICH, *op. cit. supra* note 1, § 198.

[6] Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551 (1901).

[7] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269 (1890).

[8] The Supreme Court has clearly defined the factors to be applied in determining whether a claim is penal. See Huntington v. Attrill, 146 U. S. 657, 666, 13 Sup. Ct. 224, 227 (1892).

[9] Fauntleroy v. Lum, 210 U. S. 230, 28 Sup. Ct. 641 (1908).

[10] Atherton v. Atherton; Thompson v. Thompson; Bates v. Bodie, all *supra* note 5. For the importance of matrimonial domicile in the state of rendition as affecting the duty to give full faith and credit, *cf.* Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906); Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417. See, further, GOODRICH, *op. cit. supra* note 1, § 131; CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) Proposed Final Draft No. 1, § 60.

[11] If Georgia could modify its decree, South Carolina could compel the father to support his child. 1 STAT. 122 (1790), 2 STAT. 299 (1804), 28 U. S. C. A. § 687 (1928) provides: ". . . judicial proceedings . . . shall have such faith and credit given to them . . . as they have by law or usage in the courts of the State from which they are taken." Thus, where a portion of a decree is beyond the power of modification in the court of rendition, and part is still subject to revision, a sister state is compelled to accord only *pro tanto* credit to the former part: Lynde v. Lynde, 181 U. S. 183, 21 Sup. Ct. 555 (1901); Israel v. Israel, 148 Fed. 576 (C. C. A. 3d, 1906); see Sistare v. Sistare, 218 U. S. 1, 17, 30 Sup. Ct. 682, 686 (1910).

[12] 2 VERNIER, AMERICAN FAMILY LAWS (1932) § 95. For an excellent survey of the law respecting a father's continuing obligation to support a minor child after divorce, see references cited at p. 212.

[13] The cases cited by the dissenting justice in support of his arguments may be distinguished on other grounds. The refusal of courts to recognize the decrees of another state, for reasons of interest in the welfare of infants, has been adversely criticized as manifesting a lack of confidence in the competence of judicial officers of the sister state: see Goodrich, *Custody of Children in Divorce Suits* (1921) 7 CORN. L. Q. 1; Note (1933) 81 U. OF PA. L. REV. 970; *cf.* Note (1932) 80 U. OF PA. L. REV. 712. Further, there was no practical reason for granting relief to the child in the instant case: her grandfather testified that he was able and willing to provide for her education and maintenance if her father was unable to do so, principal case at 182.

more desirable. However, it is submitted that the furtherance of certainty and uniformity in conflict of laws rules respecting recognition of judgments of sister states outweighs the probable benefit to be derived in individual cases from recognizing exceptions which might become dangerous precedents.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—NUISANCE—VALIDITY OF ZONING ORDINANCE AUTHORIZING A USE ALREADY DECLARED A NUISANCE—Plaintiffs secured an injunction against defendant's funeral establishment as a nuisance. Under a subsequent zoning ordinance defendant's premises fell within a district where such use was permitted. Defendant thereupon reopened the case, and sought to vacate the injunction. *Held,* that the injunction continue, since the operation of the funeral home was a nuisance,[1] and hence the ordinance sanctioning such operation was unconstitutional as an arbitrary and unreasonable exercise of the police power. *Gunderson v. Anderson,* 251 N. W. 515 (Minn. 1933).

The instant case presents the somewhat novel situation where a zoning ordinance was attacked not on the usual ground that such legislation deprived an owner of the right to use his land for a purpose otherwise lawful,[2] but because it sought to permit a use which the court deemed undesirable. On the facts present—the residential character of the neighborhood, and the suspicion of "gerrymandering" in drafting the ordinance[3]—there can be little quarrel with the result reached. Involved in the decision, however, is the larger question of the place in a comprehensive zoning system of the law governing nuisances. Traditionally, zoning legislation has been held valid only insofar as it represents an exercise of the police power in furtherance of public health, morals, and safety.[4] From this criterion, if a zoning ordinance sanctions a use which the court has previously declared a nuisance, it seems easily possible that the court will find the statute not conducive to public health and welfare, but on the contrary *detrimental,* and therefore invalid. On the other hand, proponents of zoning laws have repeatedly insisted that the proper objectives of such reform extend far beyond the immediate furtherance of public health or safety.[5]

[1] It is well settled that a funeral home, while not a nuisance *per se,* may become such in fact when located in a residential neighborhood. Albright v. Crim, 185 N. E. 304 (Ind. App. 1933); Saier v. Joy, 198 Mich. 295, 164 N. W. 507 (1917); Beisel v. Crosby, 104 Neb. 643, 178 N. W. 272 (1920); 3 COOLEY, TORTS (4th ed. 1932) § 435. For full discussion see McIntosh, *Injunction Against Undertaking Establishments in Residential Districts* (1930) 34 LAW NOTES 4; Lynch, *Restricting the Location of Undertaking Establishments* (1926) 14 GEO. L. J. 352.

[2] In almost every case where the constitutionality of zoning legislation is questioned the property owner has sought to utilize his land for some purpose barred by the ordinance. Cusack v. City of Chicago, 242 U. S. 526, 37 Sup. Ct. 190 (1917); Euclid v. Ambler, 272 U. S. 365, 47 Sup. Ct. 114 (1926); Jack Lewis, Inc. v. Mayor, 164 Md. 146, 164 Atl. 220 (1933); State v. Harper, 182 Wis. 148, 196 N. W. 451 (1923).

[3] To include defendant's premises in the restricted commercial zone it was necessary to extend the latter in a narrow corridor, as an offshoot from the main business street. For some distance on both sides of this corridor the land was classed as strictly residential. Defendant as mayor approved the ordinance.

[4] This doctrine appears in virtually every adjudication of such ordinances. See Euclid v. Ambler, *supra* note 2, at 391, 47 Sup. Ct. at 119; Gorieb v. Fox, 274 U. S. 603, 609, 47 Sup. Ct. 675, 677 (1927); Opinion of the Justices, 234 Mass. 597, 603, 127 N. E. 525, 528 (1920); Pritz v. Messer, 112 Ohio St. 628, 638, 149 N. E. 30, 33 (1925). See METZENBAUM, LAW OF ZONING (1930) 68.

[5] Baker, *Aesthetic Zoning Regulations* (1926) 25 MICH. L. REV. 124; Bettman, *Constitutionality of Zoning* (1924) 37 HARV. L. REV. 834, 839; Freund, *Some Inadequately Discussed Problems of the Law of City Planning and Zoning* (1929) 24 ILL. L. REV. 135; Landels, *Zoning: An Analysis of its Purposes and Legal Sanctions* (1931) 17 A. B. A. J. 163; WILLIAMS, LAW OF CITY PLANNING AND ZONING (1922) 199.

These advocates stress zoning as a systematic plan for securing the greatest usefulness and conserving the value of urban land, through conformity to a predetermined, orderly development.[6] Should these purposes be accepted as valid—and this seems the effect if not the explicit theory of several decisions [7]—then the right of a property owner to make an "offensive" use of his land will depend not on the possibly harmful effect upon adjoining owners, as is primarily the case in the law of nuisances,[8] but rather on the propriety of the use as determined by the prescribed purpose to which the entire zone is to be put. Acceptance of this view requires as much that "non-offensive" users give way to "offensive" users as the reverse.[9] Some few courts have ignored this effect of zoning ordinances upon the law applicable to nuisances, either by simply disregarding such statutes or treating them as a minimum regulation only.[10] The attitude taken by the court in the instant case seems clearly preferable in this respect. By condemning *this* ordinance as an unreasonable exercise of the police power the court impliedly recognized that zoning legislation, impartially and competently drafted,[11] is a primary consideration in determining the propriety of the use to which land may be put.

CONTRACTS—RIGHT OF THIRD PARTY BENEFICIARIES TO RECOVER IN PENNSYLVANIA—*X* company contracted under seal with husband to pay him an annuity for life, and after his death an annuity to wife for life, in consideration for which husband relinquished his interest in the company and promised that neither he nor wife would engage in any business similar to that conducted

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[6] See citations *supra* note 5.

[7] Such a broad, undefinable concept as "police power" obviously permits a court to sanction any result thought socially desirable. Note the language of Sutherland, J., in Euclid v. Ambler, *supra* note 2, at 387, 47 Sup. Ct. at 118. Frequently the justifications of such ordinances on the basis of their furtherance of public health and morals seem strained and artificial. See Cusack v. City of Chicago, *supra* note 2, at 529, 37 Sup. Ct. at 191 (ordinance prohibiting billboards valid exercise of police power since such objects may shield loiterers or criminals, or conceal immoral practices). For a striking example of the validation of a zoning ordinance on the narrow ground of a health measure, combined with the clear recognition of the further ideals of zoning, see Jack Lewis, Inc. v. Mayor, *supra* note 2, at 152, 164 Atl. at 223. Compare this case with Goldman v. Crowther, 147 Md. 282, 128 Atl. 50 (1925). For discussion of this point see (1932) 81 U. OF PA. L. REV. 81.

[8] The difference is really one of degree only, since unquestionably a court of equity considers the general character of the neighborhood as a factor where an injunction is sought against an alleged nuisance. But chief consideration is given to the harm caused by one party to the other. Compare the reasoning in Hurlbut v. McKone, 55 Conn. 31 (1887) (neighborhood almost wholly industrial, but defendant enjoined since his operations in fact caused plaintiff great discomfort) with that of White v. Luquire Funeral Home, 221 Ala. 440, 129 So. 84 (1930) (injunction refused since very purpose of zoning ordinance was to provide for change of neighborhood from residential to commercial district).

[9] It has been suggested that in designated sectors a zoning ordinance should be considered as granting a license to maintain what would otherwise constitute a nuisance. See Bettman, *supra* note 5, at 842.

[10] See Perrin's Appeal, 305 Pa. 42, 51, 156 Atl. 305, 307 (1931). Where a permit is required to conduct a particular business in given districts, an owner who secured such a permit has nevertheless been enjoined on the ground that the permit represented only the permission of the *municipality*, and did not take away the right of a third person to object. Hatcher v. Hitchcock, 129 Kan. 88, 281 Pac. 869 (1929); *cf.* Beane v. H. K. Porter, Inc., 28 Mass. 538, 180 N. E. 823 (1932).

[11] See *supra* note 3. The necessity for thoroughness and impartiality in drafting a zoning ordinance cannot be over-estimated. The possibilities for corruption and abuse are very great, in that existing users can be given a virtual monopoly in their use by a statute forbidding the further use of land for such purposes. See Landels, *supra* note 5, at 167. *Cf.* Dobbins v. City of Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18 (1904) (permit, and not zoning ordinance involved).

by the company. The annuity was paid to wife for fourteen years after husband's death, when *X* company was succeeded by *Y* company which acquired the former's assets. *Y* refused to continue payment to wife on the ground that it was under no contractual obligation to her, as she was not a party to the contract. *Held,* that wife could recover against *Y* as a third party beneficiary of the contract between *X* and husband. *Philipsborn v. 17th & Chestnut Streets Holding Corporation,* 169 Atl. 473 (Pa. Super. 1933).

Although the recent Pennsylvania case of *Commonwealth v. Great American Indemnity Co.*,[1] allowing a donee beneficiary to recover, rested in part on a statutory ground,[2] the comprehensive *dicta* in that decision, which endorsed the *Restatement* view,[3] favoring recovery by both donee and creditor beneficiaries, clearly anticipated the instant holding. Whatever fear, therefore, which may have existed that the case would suffer the unfavorable reception accorded *Brill v. Brill*[4] would seem now to be dispelled.[5] Nevertheless, while acknowledging the liberal expressions in the *Great American Indemnity Co.* case as the newly entrenched Pennsylvania law on third party beneficiaries, the treatment by the present court of this class of controversy still leaves something to be desired by way of clarity and completeness. If, as the court purported, its intention was to follow the *Restatement,* then all that should have been necessary in order to determine the rights of beneficiaries would have been to discover an intent to confer upon them a right of action against the promisor.[6] The reliance by the court, therefore, on the facts that the beneficiary in the instant case furnished part of the consideration by abstaining from going into business was entirely unnecessary. If by this it was meant to limit recovery by beneficiaries to cases in which they are parties to the consideration, then the Pennsylvania law is in no more advanced a state than it was at the time of *Blymire v. Boistle.*[7] But, fortunately, in view of the tenor of the rest of the opinion, such delimiting language seems only to be a lip-service to the past. Having proceeded to this point, however, it is regrettable that the court did not seize the instant opportunity to differentiate between donee and creditor beneficiaries, and thereby

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[1] 312 Pa. 183, 167 Atl. 793 (1933), (1933) 82 U. OF PA. L. REV. 58.

[2] PA. STAT. ANN. (Purdon, Supp. 1933) tit. 8, § 146 specifically provides for suits by laborers and materialmen on surety bonds given to the Commonwealth or municipalities by contractors to secure performance of public works or improvements. See Commonwealth v. Great American Indemnity Co., *supra* note 1, at 190, 167 Atl. at 797.

[3] CONTRACTS RESTATEMENT (Am. L. Inst. 1932) §§ 135, 136, 345 (1) (b) and (2), expressing the overwhelming majority doctrine. Only Massachusetts and Michigan compose the present American minority.

[4] 282 Pa. 276, 127 Atl. 840 (1925), which together with Tasin v. Bastress, 284 Pa. 47, 130 Atl. 417 (1925), seemed clearly to indicate a change of attitude by the Pennsylvania courts favorable to recovery at least by donee beneficiaries, although in fact Brill v. Brill was the case of a creditor beneficiary. The salutary effect of these decisions, however, was soon annulled by Greene County v. Southern Surety Co., 292 Pa. 304, 141 Atl. 27 (1927), which explained away the Brill case as having been decided on grounds of public policy, and the Tasin case as having been creative of a "new exception" to the Pennsylvania view. For an excellent criticism of the Greene County case see Note (1928) 76 U. OF PA. L. REV. 594. The whole subject is critically surveyed in Corbin, *The Law of Third Party Beneficiaries in Pennsylvania* (1928) 77 U. OF PA. L. REV. 1.

[5] One other decision since Commonwealth v. Great American Indemnity Co., *supra* note 1, has recognized that the right of a donee beneficiary to recover is no longer an open question in Pennsylvania. Copeland's Estate, 313 Pa. 25, 169 Atl. 367 (1933).

[6] CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 133.

[7] 6 Watts 182 (Pa. 1837), a leading case, in which a creditor beneficiary was denied recovery on the theory that (1) he was not a party to the consideration, and (2) to hold otherwise would subject the promisor to the danger of two suits. The first ground was the whole basis of the decision in Hinds v. Holdship, 2 Watts 104 (Pa. 1833).

more clearly to define the interrelationships of the parties.[8] Considering, as apparently the court did, that the only contract here in question was the one between *X* and husband, it is manifest that the wife is a donee beneficiary, since the annuity created as to her was not in discharge of any obligation owing to her by husband. But whether she can assert her rights under *that* contract against *Y* is not so evident, unless it is assumed that *Y* (as *X's* successor and assignee of the *X*-husband contract) expressly or impliedly obligated itself to perform to wife.[9] However, even under such a state of facts, it is submitted that a clearer view than that of the court is to consider the wife's rights against *Y* as accruing only under the contract of assignment between *X* and *Y*;[10] and as to this contract wife was properly a creditor beneficiary, since the promise extracted from *Y* to assume *X's* contractual duties was in discharge of *X's* obligation to wife. Despite the somewhat incomplete analysis of the problem confronting the court, it is reassuring to note that Pennsylvania has definitely abandoned its former vacillating attitude even to the extent of permitting recovery by beneficiaries where the instrument in suit is under seal.[11]

CORPORATIONS—REORGANIZATION—UPSET PRICE—FUNCTION OF UPSET PRICE IN REORGANIZATION OF INDUSTRIALS—Dissenting bondholders attacked the upset price fixed by the court in a reorganization of an industrial as the measure of their cash distribution. The price was determined without appraisement from figures presented by the reorganization committee.[1] *Held,* that the case be remanded for appraisement and the determination of an upset price

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[8] This distinction is of particular importance with respect to the power of the contracting parties to rescind. The rights of a donee beneficiary accrue immediately upon the making of the contract, and any subsequent attempt at rescission is of no effect, while in the case of a creditor beneficiary the contracting parties may rescind at any time before the creditor acts in reliance upon the contract. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) §§ 142, 143; 1 WILLISTON, CONTRACTS (1924) §§ 396-397.

[9] From neither the opinion nor the appellate briefs was it possible to discover whether *Y* in fact did promise to assume *X*'s obligation; but since *Y* did not deny that such was the case, it may safely be assumed.

[10] Most courts simply state as a rule of law that an assignee who promises to perform his assignor's contractual duties is directly liable to the other contracting party. An analysis of the cases, however. will reveal that the reason for permitting such recovery is that in every case (where there has been no novation) the other party to the contract is substantially—with respect to the assignee's undertaking—a third party beneficiary. This seems particularly evident when it is considered that unless the assignee does promise to perform the assignor's obligation, the other party to the contract may only look to the assignor in the event that the assignee fails to perform the duties described by the assigned contract. Grismore, *Is the Assignee of a Contract Liable for the Non-Performance of Delegated Duties?* (1920) 18 MICH. L. REV. 284; 1 WILLISTON, CONTRACTS 412. But see Blue Star Navigation Co. v. Emmons Coal Mining Corp., 276 Pa. 352, 120 Atl. 459 (1923).

[11] In this respect the principal case follows Commonwealth v. Great American Indemnity Co., *supra* note 1, which overruled Greene County v. Southern Surety Co., *supra* note 4, thereby abolishing a technicality which had its only reason in archaic rules of pleading.

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[1] As determined by the lower court, the upset price of $2,500,000 covered *inter alia* $1,500,000 in cash; good notes and receivables amounting to $650,000; securities valued at $89,000; a total of $2,250,000 in liquid assets. In addition there were the plants, warehouses and machinery carried on the books at $6,300,000; good will, patents and trade marks carried at $6,600,000; and assets classed as miscellaneous carried at $180,000, all of which latter were sold, therefore, for $250,000, or about 2% of their book value. This was obviously less than even the scrap value.

equal to "the largest amount in cash which could be realized through a sale of the assets", as a whole or piecemeal. *First National Bank of Cincinnati v. Flershem,* 54 Sup. Ct. 298 (1934), *rev'g* 64 F. (2d) 847 (C. C. A. 3d, 1933).

At least in so far as reorganizations of industrials are concerned, the Court in this case has enunciated the function of the upset price. Mr. Justice Brandeis clearly points out that which writers on the subject have evidently overlooked, or to which they have failed to give sufficient weight. In the case of railroads, and perhaps of other utilities, there is involved a tremendous public interest, and an imperative necessity for the continued operation of the system demanding its sale as an entirety.[2] This forces the court, when fixing an upset price, to weigh the interests of the dissenting minority, deprived of its right to benefit by a piecemeal sale of the assets,[3] as against the necessities of communities to whom the finding of a purchaser and the accomplishment of the reorganization means bread.[4] But the court has absolutely no interest in fostering an industrial's reorganization.[5] It is true that the parties may, if they so desire, contract *inter se* to preserve the going concern, and the court will aid in effectuating the contract.[6] But the prime concern is and should be the protection of those who do not share in the desire of the reorganizers, no matter how small a minority they may constitute, and the preservation inviolate of their right to have the assets sold in the manner that will bring the greatest return. This is especially so in present times when management of business associations is far more lucrative than their ownership, and the perpetuation of the management rather than the desire to improve the position of the creditors may conceivably be the motivating force in the reorganization. The protection of the dissentients calls for an informed independent judgment on the part of the court at every stage of the proposed reorganization.[7] However, the reorganization should be permitted if the reorganizers are able and willing to compensate the dissentients for any loss which they may sustain through a sale by the en-

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[2] "The public, though not a party to the record, has an interest in every railroad reorganization accomplished by foreclosure, of which the court should take notice." Hook, J., in Central Trust Co. v. Missouri, K. & T. Ry., 246 Fed. 154, 156 (E. D. Mo. 1917). This interest led to the rule of Fosdick v. Schall, 99 U. S. 235 (1878), which gives priority, even over lien claimants, to creditors who supplied materials or services necessary to the preservation of the road during the six months next preceding the receivership. See also Farmers' L. & T. Co. v. Cape Fear Ry., 82 Fed. 344, 347 (C. C. E. D. N. C. 1897), *aff'd,* Low v. Blackford, 87 Fed. 392 (C. C. A. 4th, 1898); Chicago, D. & V. Ry. v. Loewenthal, 93 Ill. 433, 450 (1879); Gibert v. Washington City, *etc.* Ry., 33 Gratt. 586, 609 (Va. 1880).

[3] But see Colin, *Why Upset Price? An Argument for Reorganization by Decree* (1933) 28 ILL. L. REV. 225, 235, where the proposition is made that to set an upset price deprives the majority of its right "to have the property sold at absolute auction". Mr. Colin apparently forgets that the right is further qualified by the phrase "so as to bring the greatest return" which might conceivably involve scrapping all or part of the plant.

[4] The problem of determining upset prices in railroad cases has been skillfully analyzed by Weiner in *Conflicting Functions of the Upset Price in a Corporate Reorganization* (1927) 27 COL. L. REV. 132. See also Spring, *Upset Prices in Corporate Reorganization* (1919) 32 HARV. L. REV. 489.

[5] See principal case at 306.

[6] See Guaranty Trust Co. v. International Steam Pump Co., 231 Fed. 594, 595 (C. C. A. 2d, 1916). The plan must, however, be fair. National Surety Co. v. Coriell, 289 U. S. 426, 53 Sup. Ct. 678 (1933).

[7] National Surety Co. v. Coriell, *supra* note 6. Note the principal case at 306, where, in commenting upon the failure of the dissenters to produce evidence at the hearing, Mr. Justice Brandeis says, "It would be unreasonable to impose upon a few dissenting creditors the heavy financial burden of making an adequate appraisal supported by the testimony of competent experts, where, as here, the assets include extensive plants and equipment located in nine states."

tirety [8] (accompanied as it is by less spirited bidding) and perhaps as well for anything additional the reorganizers gain thereby.[9]

CRIMINAL LAW—USE OF MAILS TO DEFRAUD—STOCK MARKET MANIPULATION AS A SCHEME TO DEFRAUD—Defendants were indicted [1] for use of the mails in connection with a scheme to defraud by artificially manipulating a certain listed stock to raise the price thereof, through the use of false representations and wash sales, and inducing the public to purchase at such increased price. Defendants demurred to the indictment. *Held,* that the scheme constituted such a fraud that use of the mails in connection with it properly subjected the defendants to prosecution. *United States v. Brown,* 5 F. Supp. 81 (S. D. N. Y. 1933).

In practical result there is no discernible difference between the issuance of false reports for the purpose of dishonestly affecting the price of a commodity or security, a practice condemned by the common law,[2] and manipulative operations on one of the exchanges for the purpose of effecting a change in the quoted price of a certain issue. The report of a sale on an exchange is a representation that a transaction has been completed in an open market, in which the prices are believed to result from a spontaneous auction.[3] If in fact it is a controlled market, such representation is false. The court, in the instant case, in denominating market manipulation a fraud,[4] adopted a view consistent with the common law and with the policy of the federal courts in branding schemes to establish credit [5] or to dispose of worthless securities [6] as punishable frauds. Although the self-government of the exchanges has not resulted in the extreme

[8] The Court, at 307, details the method to be used in fixing the upset price. As the Coriell case decided, a full appraisal must be made and a price set taking into consideration all possible ways of offering the assets for sale and all possible locations for the sale and choosing the most lucrative. Attention is also to be given to the condition of the various companies originally merged into the defunct corporation as indicative of the possible profitable operation of smaller units.

[9] Perhaps the good will must also be valued in a sale of the entirety, since it is the principal asset desired. See Nave-McCord Mercantile Co. v. Ranney, 29 F. (2d) 383 (C. C. A. 8th. 1928).

[1] Under U. S. CRIM. CODE, § 215, 35 STAT. 1130 (1909), 18 U. S. C. A. § 338 (1927).

[2] Chicago, W. & V. Coal Co. v. Illinois, 214 Ill. 421, 73 N. E. 770 (1905) (conspiracy to regulate price of coal); People v. Goslin, 67 App. Div. 16, 73 N. Y. Supp. 520 (1902) (attempt to depress market value of shares of stock by false rumors); Rex v. Waddington, 1 East 143 (Eng. 1800) (spreading rumors to raise price of hops); Rex v. DeBerenger, 3 M. & S. 67 (Eng. 1814) (conspiracy to raise price of government funds by circulating false reports); Reg. v. Lewis, 11 Cox C. C. 404 (Eng. 1869) (sham bidders at auction raised goods above their worth); Rex v. Aspinall, 2 Q. B. D. 48 (Eng. 1876); see State v. DeWitt, 2 Hill 282 (S. C. 1834); MCMATH, SPECULATION AND GAMBLING (1921) 28-30.

[3] HICKERNELL, WHAT MAKES STOCK MARKET PRICES? (1932); MEEKER, THE STOCK EXCHANGE (1930) 48; Berle, *Liability for Stock Market Manipulation* (1931) 31 COL. L. REV. 264, 267.

[4] Although the manipulation in this case included the use of methods in themselves flagrantly fraudulent, nevertheless the court condemns *all* efforts to raise the price of a listed stock artificially. Principal case at 93. An excellent definition of manipulation for the purposes of this discussion is given in Untermyer, *Regulating the Stock Exchange,* TODAY, Jan. 27, 1934, p. 3, at 22: ". . . define the manipulation of securities as the actual or pretended purchase or sale, or both, of securities for the purpose of creating a market, or an apparent market, and as giving to such transactions or to the market in such securities or to the public, a false or misleading appearance of activity, or artificially to depress, inflate, or otherwise influence the market price thereof, in order to buy or sell or to attract public attention to such securities to induce the purchase or sale thereof by others."

[5] Tenenbaum v. United States, 11 F. (2d) 927 (C. C. A. 5th, 1926).

[6] Hyney v. United States, 44 F. (2d) 134 (C. C. A. 6th, 1930); Norcott v. United States, 65 F. (2d) 913 (C. C. A. 7th, 1933).

irregularity of practices as many agitators for reform allege,[7] nevertheless the legal remedies against the manipulator and the evil of manipulation are few. Much attention has been given to the prevention of the issuance of worthless securities,[8] but little thought has been given to those practices by which the prices of already issued securities are boosted beyond relation to their actual value.[9] Some few manipulators have been held liable to their victims in civil actions, but a liberalization of the rules of liability for deceit is needed to make this remedy effective.[10] The civil test of liability should be disregarded in criminal prosecutions involving fraud, and fraud should be given a wide meaning.[11] The threat of criminal prosecution will probably prove to be an active deterrent to the manipulator, since punishment for such a crime will usually result in the manipulator's financial death. The instant case points the way for the use of the governmental control of the mails as one powerful method of controlling this stock market evil.[12] By the mere expansion of judicial interpretation this might possibly be widely extended, for the government can prohibit the use of the mails in the furtherance of any scheme even though it cannot forbid the scheme.[13] But substantially complete control of the exchanges can be gained only through the legislative establishment of requirements that must be met before the activities of an exchange will be approved and permission granted to carry on its affairs through the mails and in interstate commerce.[14]

DECLARATORY JUDGMENTS—HUSBAND AND WIFE—RIGHT OF WIFE TO A DECLARATORY JUDGMENT OF HER MARITAL STATUS WHEN IT IS IMPEACHED ONLY BY RUMORS OF DIVORCE—Plaintiff and defendant Joseph Somberg were married in New York in 1918, and no court of any jurisdiction thereafter pur-

[7] For the Rules of the New York Stock Exchange see MEYER, STOCKBROKERS AND STOCK EXCHANGES (1931), and 1933 Supplement. For criticism of the exchange see Untermyer, *supra* note 4.

[8] REED & WASHBURN, BLUE SKY LAW SERVICE; cases cited *supra* note 6.

[9] New York has taken a step forward in the effort to check some of the evils of the exchange without interfering with any of its functions, by the passage of the Martin Act, N. Y. GEN. BUS. LAW (1933) art. 23-A. For comment thereon see Ottinger, *Martin Act* (1926) 47 REPORT OF N. Y. STATE B. A. 218; Bennett, *Administration of the Martin Act* (1932) 4 N. Y. STATE B. A. BULL. 428. For a prosecution under the Act in a matter similar to that in the principal case see People v. Rice, 221 App. Div. 443, 223 N. Y. Supp. 566 (1927).

The Securities Act of 1933, 48 STAT. 74 (1933), 15 U. S. C. A. SUPP. § 77 (1933), is drafted so as to be more effective in preventing fraud at time of issue of the securities than in preventing other evils occurring in security transactions. See *Symposium on the Federal Securities Act* (1933) 43 YALE L. J. 171. A virtually complete regulation of the exchanges and their concomitant evils may be accomplished, however, by the passage of the proposed National Securities Exchange Act of 1934, N. Y. Times, Feb. 10, 1934, at 6.

[10] If the requirement of proof of "scienter" on the part of the manipulator, and proof that the "victim" was the one intended to be defrauded and actually did suffer a loss, is waived by the courts, there will be a greater possibility of recovery by such victims. The knowledge that gains acquired by the manipulator's unscrupulous market practices may be seized by his "victims" may deter the manipulator as much as fear of criminal prosecution. *Cf.* Shulman, *Civil Liability and the Securities Act* (1933) 43 YALE L. J. 227.

[11] See United States v. Hersey, 288 Fed. 852 (D. Mass. 1923); People v. Federated Radio Corp., 244 N. Y. 33, 154 N. E. 655 (1926).

[12] Hanna, *The Federal Regulation of Stock Exchanges* (1931) 5 So. CALIF. L. REV. 9. Section 5 of the Securities Act of 1933, 48 STAT. 77 (1933), 15 U. S. C. A. SUPP. § 77e (1933), makes the use of the mails and interstate commerce unlawful unless the other provisions of the Act are complied with, and the proposed National Securities Exchange Act, *supra* note 9, contains a similar provision in Section 4.

[13] Badders v. United States, 240 U. S. 391, 36 Sup. Ct. 367 (1916); United States v. Burleson, 255 U. S. 407, 41 Sup. Ct. 352 (1921).

[14] See suggestion advanced by Untermyer, *supra* note 4, and the proposed Act, *supra* note 9.

ported to dissolve this marriage. At the time of this action, Joseph Somberg was living with defendant Rose Baskind as Mr. and Mrs. Somberg. It was generally rumored and believed, in the circle to which the parties belonged, that Joseph Somberg had divorced the plaintiff and had married Rose Baskind. Plaintiff sought a declaratory judgment that she was the lawful wife of Joseph Somberg, and an injunction restraining Rose Baskind from using the name Somberg, Joseph Somberg from holding Rose out to be his lawful wife, and Joseph and Rose from representing themselves to be husband and wife. *Held* (three judges dissenting), that plaintiff was entitled to none of the relief prayed for, the injunctive relief being denied on authority, and the declaratory judgment because "the plaintiff's status, as the wife of Joseph S. Somberg, is secure". *Somberg v. Somberg,* 263 N. Y. 1, 188 N. E. 137 (1933).

The question of the right to injunctive relief in this situation was no longer an open one in New York, the Court of Appeals having—rightly or wrongly—decided against it in *Baumann v. Baumann.*[1] But even a more generous view of the plaintiff's right in this respect would not impugn the validity of the court's conclusion on the other issue, the declaratory judgment. The questions are distinct: the purpose of the declaratory judgment is to obtain an authoritative definition of uncertain legal relations;[2] the injunction, on the other hand, is intended to prevent the embarrassment and humiliation suffered by the wife from the usurpation of her name and position by the paramour, an usurpation which may continue after, as well as before, the plaintiff's status is judicially declared.[3] It follows that the propriety of a declaratory judgment is independent of the question of plaintiff's right to the injunctive relief, and depends, in the instant case, on whether "rumors of divorce" render the plaintiff's legal status so uncertain that a declaratory judgment will serve a useful purpose.[4] In *Baumann v. Baumann,*[5] where the husband had obtained a void divorce and gone through a marriage ceremony with the codefendant, the remedy was held to be properly

[1] 250 N. Y. 382, 165 N. E. 819 (1929). The refusal to grant the injunction, on the ground that no "legal right" was invaded by the conduct on the part of the defendant which injured merely plaintiff's feelings, evoked a storm of divergent comment. See Note (1929) 17 CALIF. L. REV. 681; Note (1930) 43 HARV. L. REV. 477; Note (1929) 33 LAW NOTES 126; (1929) 28 MICH. L. REV. 342; (1929) 14 MINN. L. REV. 96; Note (1929) 4 ST. JOHN'S L. REV. 100; (1929) 78 U. of PA. L. REV. 114. That all has not been said on this important question is indicated by the fact that two of the three dissenting judges of the instant case are the Baumann v. Baumann irreconcilables, and the third is a new member of the Court. For the purposes of this note, however, it is assumed that the Court was bound by the authority of Baumann v. Baumann on the injunction point. The propriety of the declaratory judgment remains to be determined.

[2] See Borchard, *Declaratory Judgments in Pennsylvania* (1934) 82 U. OF PA. L. REV. 317, 318.

[3] The relief sought is closely akin to the right of privacy, which, in New York, is partially protected by a statute which forbids the unauthorized use of a person's name or picture for advertising purposes, and which gives damages or an injunction as civil remedies. N. Y. CIVIL RIGHTS LAW (1909) §§ 50, 51. See also Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 673.

[4] Courts will not declare legal truisms. Henze v. City of Detroit, 250 Mich. 597, 231 N. W. 51 (1930). Nor uncontroverted rights. Wardrop v. Fairfield Gardens, 237 App. Div. 605, 262 N. Y. Supp. 95 (1933). Nor will a declaratory judgment be granted where it would leave the rights of the parties still uncertain. Ziegler v. Pickett Co., 25 P. (2d) 391 (Wyo. 1933); Lewis v. Green [1905], 2 Ch. 340. (*Cf.* court's statement, in the principal case, that the declaratory judgment would not silence the rumors.)

The plaintiff is seeking to "quiet title" to her matrimonial status. In the analogous situation of equitable suits to quiet title to land, the majority rule is to the effect that the bill will be dismissed if the instrument constituting the alleged cloud is void on its face. (1932) 16 MINN. L. REV. 710; STORY, EQUITY JURISPRUDENCE (14th ed. 1918) §§ 947, 948. The principal criticism of this rule, to wit, that the market value of a title may be materially diminished by a cloud which does not meet the requirements of the rule, certainly has no application to a controversy involving marital status.

[5] *Supra* note 1.

invoked. But there is a very real difference between a divorce, though void, and mere rumors of divorce. Whether a given divorce is void is a question upon which expert legal opinion may differ; rights may accrue or be lost under a divorce of record, afterwards ascertained to be "void";[6] evidence available to prove its invalidity may be lost with the passage of time, and the "void" divorce becomes a valid divorce in practical effect, enabling the procurer thereof to remarry with safety and so cut off property rights of his true wife. But no amount of divorce *rumor* could accomplish these effects.[7] For substantial relief the plaintiff here might have instituted a prosecution for adultery, or maintained actions for divorce, support, or criminal conversation. A declaratory judgment, however, could serve no other purpose than to advertise her grievance to the world.[8]

DECLARATORY JUDGMENTS—RIGHT TO MAINTAIN ACTION AGAINST STATE OFFICERS FOR DETERMINATION OF CONSTITUTIONALITY OF STATUTE—A statute[1] provided that utility companies might lay their lines across state-owned bridges upon procuring a license from the Department of Highways, approved by the Governor, and subject to revocation on six months' notice. Petitioner claimed that the provisions requiring approval by the Governor and rendering the license revocable were unconstitutional,[2] and sought a declaratory judgment to that effect, joining the Governor and Secretary of the Department of Highways as defendants. *Held,* that the court has no jurisdiction to decide such a case. *Bell Telephone Co. of Penna. v. Lewis,* 169 Atl. 571 (Pa. 1934).

The court rested its decision on three grounds: that this was in effect a proceeding against the state, which could not be sued without its consent;[3] that any judgment could be enforced against the Governor only by mandamus, and that such a writ could not be had against him;[4] and that the petitioner had another remedy open to it, and hence could not have a declaratory judgment.[5] Considering these arguments separately, it appears first that the *Uniform Declaratory Judgments Act* intended that actions under it might be brought against

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[6] Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158.

[7] The bill for a declaratory judgment is often the equivalent of an action to perpetuate testimony. See Beresford v. Att'y Gen., [1918] P. 33.

[8] The inadequacy of a declaratory judgment without injunctive relief is pointed out by O'Brien, J., in his dissent from Baumann v. Baumann, *supra* note 3, at 393, 165 N. E. at 823, and is recognized even in a note which agrees with the result of that case. Note (1930) 43 HARV. L. REV. 477, 480. See also Note (1929) 4 ST. JOHN'S L. REV. 100. The delicacy expressed by the court in the sentence that "it is not fitting here that the court should solemnly declare the continuance of the marital status of the plaintiff, with its necessary corollary that Rose Baskind is living in adultery and that her child is illegitimate", has not been felt by other courts. Where there was a purpose to be served, declarations have been granted which directly affirm the illegitimacy or unchastity of defendants. Morecroft v. Taylor, 225 App. Div. 562, 234 N. Y. Supp. 2 (1929); *In re* Phillips, [1919] 1 Ch. 128.

With the instant case *cf. Ex parte* Eubanks, 202 N. C. 357, 162 S. E. 769 (1932) (plaintiff denied a declaratory judgment that he is three-quarters white and one-quarter Indian, partly on the ground that "his purpose partakes of a social matter rather than a legal controversy").

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[1] PA. STAT. ANN. (Purdon, 1930) tit. 71, § 194 (a) and tit. 36, § 2934.

[2] PA. CONST., art. 16, §§ 10, 12.

[3] PA. CONST., art. 1, § 11; Collins v. Commonwealth, 262 Pa. 572, 106 Atl. 229 (1919).

[4] PA. STAT. ANN. (Purdon, 1930) tit. 12, § 1911.

[5] Citing Kariher's Petition (No. 1), 284 Pa. 455, 471, 131 Atl. 265, 271 (1925): "A proceeding to obtain such judgment will not be entertained . . . where another statutory remedy has been specially provided for the character of case in hand." The court argues that the petitioner has "a fully adequate remedy" under the Mandamus Act, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 1911.

state officers [6] for this very purpose,[7] and that that very thing had been allowed in an earlier case by this court.[8] Although the interests of the parties must be adverse to give jurisdiction to render a declaratory judgment,[9] the effect of such judgment is merely to declare the rights of the parties without compelling either of them to disturb the *status quo,* a remedy peculiarly appropriate in a case such as this.[10] As to the second argument, that a declaratory judgment could be enforced against the Governor only by mandamus, the court is equally in error: all that petitioner requested was a negative judgment informing the Governor that his approval was not necessary or that the license could not be revoked. There was nothing in the case to justify bringing mandamus,[11] and it is inconceivable that the defendants would have the temerity to ignore a judgment of the Supreme Court. The court's final argument is that a declaratory judgment is an exclusive, and not an alternative, remedy, relying on the language used in *Kariher's Petition.*[12] The history of the phrase thus used has been traced recently by Professor Borchard,[13] and he has pointed out that the type of statutory remedy which the declaratory judgment was not intended to circumvent is that in which a specific statute has conferred a special jurisdiction under particular circumstances for the solution of a particular problem. Mandamus is not such a specific remedy, but a general remedy. It appears that each of the arguments advanced by the court shows a misconception of the scope and function of the declaratory judgment, and can have only the regrettable effect of restricting its use.[14]

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[6] UNIFORM DECLARATORY JUDGMENTS ACT, § 11. See Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 Sup. Ct. 345 (1933); Zoercher v. Agler, 172 N. E. 186 (Ind. 1930); Tennessee Eastern Elec. Co. v. Hannah, 157 Tenn. 582, 12 S. W. (2d) 372 (1928).

[7] UNIFORM DECLARATORY JUDGMENTS ACT, §§ 2, 11. See *In re* Hudson County Freeholders, 103 N. J. L. 702, 143 Atl. 536 (1928); Cummins v. Shipp, 126 Tenn. 595, 3 S. W. (2d) 1062 (1928); Note (1932) 41 YALE L. J. 1195, 1203 *ff.*

[8] Evans, Inc. v. Baldrige, 294 Pa. 142, 144 Atl. 97 (1928) (statute prohibiting corporations from owning drug stores unless all members of the corporation were registered pharmacists *held* to be unconstitutional in an action against the attorney general, the State Board of Pharmacy, and the district attorney of Philadelphia county). This case was not cited by the court in the instant case, nor does it appear in the briefs of counsel. See Liggett Co. v. Baldrige, 278 U. S. 105, 49 Sup. Ct. 57 (1928).

[9] Lynn v. Kearney County, 236 N. W. 192 (Neb. 1931); Kariher's Petition, *supra* note 5, at 469, 131 Atl. at 270; Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929); Cryan's Estate, 301 Pa. 386, 152 Atl. 675 (1930); Holly Sugar Corp. v. Fritzler, 42 Wyo. 446, 296 Pac. 206 (1931).

[10] The alternatives would have been for the company to take out a revocable license, subject to the approval of the Governor, or to attempt to construct their line without taking out the license, and then risk criminal or other proceeding for the removal of their structure. It was the purpose of the UNIFORM DECLARATORY JUDGMENTS ACT, as expressed in § 12, to allow questions such as this to be determined without compelling a party to place himself in such a precarious position.

[11] Mandamus cannot be maintained against the Governor under the provisions of the statute, PA. STAT. ANN. (Purdon, 1930) tit. 12, § 1911. It is an open question whether the Department of Highways could have been mandamused, although the court, relying on Piccirilli Bros. v. Lewis, 282 Pa. 328, 127 Atl. 832 (1925), said by way of *dictum* that it could be maintained.

[12] *Supra* note 5, and language quoted there. In Cryan's Estate, *supra* note 9, the court spoke of this as an "established remedy"; such a distortion is directly contrary to the words and purposes of the act.

[13] Borchard, *Declaratory Judgments in Pennsylvania* (1934) 82 U. OF PA. L. REV. 317.

[14] Professor Borchard, in a letter to the LAW REVIEW, said of this case: "It is very regrettable that there was not even a dissent in the case, which, in my humble judgment, contains an accumulation of errors which should not have been committed by any higher court. But such misconceptions of the scope and functions of the declaratory judgment can only discourage its use. The declaratory judgment statute manifests a different purpose, in that it was designed to make the courts useful to the people of Pennsylvania. The construction which I venture to criticize is contrary to that given the act in other states of this country, and in conflict with other cases in Pennsylvania."

DIVORCE—RECOGNITION OF FOREIGN DECREE—RIGHT OF SECOND HUSBAND TO SET UP AS A DEFENSE TO A SUPPORT ACTION THE INVALIDITY OF A DIVORCE WHICH HE COUNSELLED—Plaintiff was married to *O* in 1902, and lived with him in New York until 1915 when he deserted her. In February, 1916, she went to Nevada and in November obtained a divorce from *O* with service by publication. The following month she returned to New York where she lived thereafter. In January, 1917, she sued *O* for support of children and made affidavit that she was a resident of Brooklyn. Later in 1917 plaintiff married defendant whom she had known before divorce and who had advised her as to manner and place of getting one. They lived together till 1930. Present action was for separation and support. *Held,* that facts justified finding that plaintiff did not make Nevada her *bona fide* domicile, that therefore the divorce decree was invalid for want of jurisdiction, and defendant was not liable. *Lefferts v. Lefferts,* 263 N. Y. 131, 188 N. E. 279 (1933).

The policy of the New York courts has always been to scrutinize carefully foreign divorce decrees before recognizing them as binding within the state. They are part of the minority holding that full faith and credit need not be given to such divorces where the foreign court has acquired jurisdiction of but one party.[1] In the instant case, the Court of Appeals found no necessity for reiterating its much criticized stand [2] on this point, and held the divorce unworthy of consideration because no jurisdiction was obtained by the Nevada court even over the resident plaintiff, despite the fact that the statute [3] required only *residence* for six months. This statute has, however, been interpreted to mean domicile [4] as usually understood in conflict of laws,[5] so that the finding that no jurisdiction was obtained because of lack of domicile would appear proper. The effect of this holding is to make an adulterer of the defendant, an adulteress as well as a bigamist of the plaintiff, and bastards of any children of their cohabitation. New York courts, as well as others, have repeatedly asserted that it was their policy to avoid such results where possible.[6] The defendant is taking advantage of a technicality to escape the responsibility of support which he was willing to assume when he consented to marry the plaintiff. Although he is not shown by the record to have induced the plaintiff to divorce her first husband, he advised this particular manner of obtaining one, and corresponded with her when she went to Reno at his suggestion. They married shortly after the divorce and lived as husband and wife for thirteen years during all of which time no attempt was made to invalidate the marriage. There is no doubt that the plaintiff or her first husband, if he had also remarried, would be "estopped"

[1] People v. Baker, 76 N. Y. 78 (1879); see dissenting opinion by Lehman, J., in Dean v. Dean, 241 N. Y. 240, 246, 149 N. E. 844, 846 (1925). The New York rule was upheld as constitutional in Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525 (1906).

[2] Holmes, J., dissenting in Haddock v. Haddock, *supra* note 1, at 628, 26 Sup. Ct. at 551; Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Note (1913) 13 COL. L. REV. 241; GOODRICH, CONFLICT OF LAWS (1927) 291, 294. But *cf.* Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

[3] REV. LAWS OF NEV. (Supp. 1919) § 5838. The requirement has since been reduced to six weeks residence. Nev. Laws 1931, c. 97 § 22.

[4] Presson v. Presson, 38 Nev. 203, 147 Pac. 1081 (1915); Laterner v. Laterner, 51 Nev. 285, 274 Pac. 194 (1929).

[5] CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1930) Proposed Final Draft No. 1 §§ 20, 21. An intention is required to make the residence a *home* and not merely a domicile for some particular purpose. See Williamson v. Osenton, 232 U. S. 619, 624, 34 Sup. Ct. 442 (1914).

[6] See Haddock v. Haddock, *supra* note 1, at 628, 26 Sup. Ct. at 551; Passailaigue v. Herron, 38 F. (2d) 775, 777 (C. C. A. 5th, 1930), *certiorari* denied, 282 U. S. 845, 51 Sup. Ct. 25 (1930); Hubbard v. Hubbard, 228 N. Y. 81, 85, 87, 126 N. E. 508, 509, 510 (1920); Somberg v. Somberg, 263 N. Y. 1, 2, 188 N. E. 137, 138 (1933), (1934) 82 U. OF PA. L. REV. 542.

were either to contest the divorce, since the remarriage was based on it.[7] It is even possible that the first husband, not having remarried, would not now be permitted to attack that divorce, because of his *laches*.[8] The only reason ascribable for failure of counsel to urge an "estoppel" on the defendant is the summary dismissal made of that argument by the same court in *Fischer v. Fischer*.[9] But the circumstances, relationship between the parties, and length of time involved are here so substantially different as to enable application of the "estoppel" argument without any serious conflict between the cases. Furthermore, "estoppel" has been allowed as a defense where the second husband sought an annulment on the ground of an invalid divorce.[10] In light of the policy of validation of marriages, and the strong policy of securing support to an admitted wife,[11] the court in the instant case might well have employed the convenient doctrine of "estoppel" to avoid unfortunate results attendant upon the enforcement of the harsh marital policy produced by its rules on conflict of laws.

MORTGAGES—RECORDING ACTS—RIGHT OF PURCHASER TO RELY UPON RECORDS AS SHOWING A MERGER—Plaintiff failed to record an assignment of mortgage made to him by *A*, the mortgagee of record. The mortgagor subsequently conveyed the property by a recorded deed to *A*, subject to the mortgage, *A* expressly assuming the mortgage debt. *A* conveyed by a recorded warranty deed to *B*, taking back a purchase money mortgage which he recorded. This latter mortgage was ultimately assigned to defendant, all the assignments being recorded. Plaintiff intervened in foreclosure proceedings instituted by defendant and sought to establish a prior lien in the proceeds. *Held*, that plaintiff was entitled to priority, since a purchaser (or mortgagee) was not entitled to assume that a merger had occurred from the fact that the record showed that the mortgage title and the equity of redemption were in the same person, so long as the mortgage remained unsatisfied of record. *Thauer v. Smith*, 250 N. W. 842 (Wis. 1933).

Whether a mortgage is extinguished or "merged" when one person acquires both the mortgaged land and the mortgage should logically depend on whether the debt for which the mortgage is collateral is extinguished.[1] The problem has been uniformly regarded, however, as involving rather the doctrine of the merger of a less in a greater estate when acquired by one person.[2] Ordinarily, the simultaneous ownership of these two interests by one party is held to result in a merger,[3] but this is not so where a contrary intent has been expressed[4] or

[7] Kelsey v. Kelsey, 237 N. Y. 520, 143 N. E. 726 (1923), *aff'g* 204 App. Div. 116, 197 N. Y. Supp. 371 (1922); *cf.* Grimm v. Grimm, 302 Ill. 511, 135 N. E. 19 (1922); Chapman v. Chapman, 224 Mass. 427, 113 N. E. 359 (1916).

[8] Bliss v. Bliss, 50 F. (2d) 1002 (App. D. C. 1931) (nine years delay); Madden v. Madden, 222 Mich. 404, 192 N. W. 665 (1923) (five years delay); see Field v. Field, 67 Pa. Super. 355, 359 (1917) (five years delay).

[9] 254 N. Y. 463, 173 N. E. 680 (1930) (plaintiff and defendant lived together three months).

[10] Kaufman v. Kaufman, 177 App. Div. 162, 163 N. Y. Supp. 566 (1917).

[11] For good discussion of situations where defective divorces may be upheld see Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158.

[1] TIFFANY, REAL PROPERTY (2d ed. 1920) § 640 (e).

[2] Hill v. Smith, Fed. Cas. No. 6,499 (D. Ill. 1841); Forthman v. Deters, 206 Ill. 159, 69 N. E. 97 (1903); see Washington Furniture Co. v. Potter, 188 N. C. 145, 146, 124 S. E. 122, 123 (1924); 2 JONES, MORTGAGES (8th ed. 1928) § 1080.

[3] Wende v. Wende, 141 Misc. 52, 251 N. Y. Supp. 773 (1931); Thompson v. Hudgens, 161 S. C. 450, 159 S. E. 807 (1931); Clark v. Clark, 76 Wis. 306, 45 N. W. 121 (1890).

[4] Aetna Life Ins. Co. v. Corn, 89 Ill. 170 (1878); Moore v. Harrisburg Bank, 8 Watts 138 (Pa. 1839); Connecticut Inv. Co. v. Demick, 105 Wash. 265, 177 Pac. 676 (1919).

where "justice and equity require the two estates to be kept separate",[5] as when there are intervening or junior liens.[6] Accordingly, the court argued that since these extraneous factors frequently determine whether a merger occurred, a purchaser could not rely on the fact that the records showed an ownership of the mortgaged land by the mortgage creditor as conclusive that a merger resulted. That the mortgage was not discharged of record as provided for by statute [7] was regarded as constituting notice that it was still outstanding and *might* have been assigned. The fact that *B* received a warranty deed, sufficient to prevent the record mortgagee himself from subsequently denying that the mortgage was merged,[8] was given no weight. Yet the court recognized the accepted rule that if the record mortgagee has (after assigning the mortgage) fraudulently placed on record a release or satisfaction of the mortgage, a subsequent purchaser or mortgagee who records his deed or lien will take clear of or be prior to the assignee who has failed to record his assignment.[9] Nor did the court consider the effect of the fact that the record mortgagee *expressly assumed* the mortgage debt in the recorded deed by which the property was conveyed to him. This has been suggested as conclusive of a merger if he were actually the mortgage creditor at the time.[10] On the other hand, the very peculiarity of a mortgagee's assumption of the mortgage debt might well be regarded as putting a purchaser, if he knew of the terms of the deed, on notice that the mortgage had been assigned. The doctrine of the instant case has been accepted by most courts where the problem has arisen,[11] and the additional care required of a purchaser in making him demand that his vendor enter a satisfaction of the mortgage before he will be treated as a purchaser without notice within the meaning of the statute [12] is hardly unreasonable. Yet the question is purely one of policy; and to impose on the assignee of a mortgage the duty of recording the assignment in order that he may be protected and the possibilities of fraud be minimized would seem a still less objectionable burden, and certainly one more in keeping with the policy underlying the recording acts.

[5] Neff v. Elder, 84 Ark. 277, 105 S. W. 260 (1907); Snyder v. Snyder, 6 Mich. 470 (1859); Gleason v. Carpenter, 74 Vt. 399, 52 Atl. 966 (1902).

[6] *In re* Feeny Tool Co., 300 Fed. 379 (D. Conn. 1924); Purdom v. Broach, 210 Ky. 161, 275 S. W. 365 (1925); Anderson v. Starr, 159 Wash. 641, 294 Pac. 581 (1930).

[7] In Wisconsin this may be done by a marginal notation on the record signed by the mortgagee and witnessed by a clerk of the register of deeds or by presentation to the register of deeds of a certificate executed by the mortgagee, the effect of either being equivalent to recording a deed of release. See WIS. STAT. (1931) § 235.55.

[8] Pearson v. Bailey, 180 Mass. 229, 62 N. E. 265 (1902); Summy v. Ramsey, 53 Wash. 93, 101 Pac. 506 (1909).

[9] Newman v. Fidelity S. & L. Ass'n, 14 Ariz. 354, 128 Pac. 53 (1912); Ogle v. Turpin, 102 Ill. 148 (1881). See also Williams v. Jackson, 107 U. S. 478, 2 Sup. Ct. 814 (1883).

[10] TIFFANY, *loc. cit. supra* note 1. This result would appear almost inevitable if the courts regarded the problem, as Tiffany does, as one of extinguishment of the debt and consequently of the collateral mortgage—the only logical result of assuming a debt to one's self under such a view being to extinguish it.

[11] Oregon & W. Trust Inv. Co. v. Shaw, 5 Sawyer 336 (C. C. D. Ore. 1878); Merchants' Trust Co. v. Davis, 49 Idaho 494, 290 Pac. 383 (1930); Edgerton v. Young, 43 Ill. 464 (1867); Jordan v. Cheney, 74 Me. 359 (1883); Curtis v. Moore, 152 N. Y. 159, 46 N. E. 168 (1897); Zorn v. Van Buskirk, 111 Okla. 211, 239 Pac. 151 (1925). *Contra:* Bowling v. Cook, 39 Iowa 200 (1874); Ames v. Miller, 65 Neb. 205, 91 N. W. 250 (1902). See also Gregory v. Savage, 32 Conn. 250 (1864); Artz v. Yeager, 30 Ind. App. 677, 66 N. E. 917 (1903); Leonard v. Leonia Heights Land Co., 81 N. J. Eq. 43, 85 Atl. 602 (1912); Summy v. Ramsey, *supra* note 8.

[12] The statute reads "Every conveyance of real estate within this state . . . which shall not be recorded as provided by law shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof whose conveyance shall first be duly recorded." WIS. STAT. (1931) § 235.49. The court recognizes the fact that an assignment of a mortgage is here included and that a subsequent mortgagee is a "purchaser", but its decision rests on the ground that the existence of an unsatisfied mortgage on the record is notice.

TORTS—NEGLIGENCE—IMPUTABILITY OF NEGLIGENCE OF ONE JOINT ENTREPRENEUR TO ANOTHER—Plaintiffs were guests of the defendants on an automobile trip the purpose of which was to witness a baseball game, the defendants being joint owners of the automobile. Due to the negligence of the defendant who was driving, plaintiffs were injured. *Held,* that plaintiffs were not engaged in a joint enterprise with the defendants and consequently the negligence of the driver was not imputable to them, both defendants being liable since they were joint owners engaged in a joint enterprise. *Claxton v. Claxton,* 64 S. W. (2d) 854 (Tenn. 1932).

Recourse to patent fictions [1] in an attempt to rationalize the doctrine of *respondeat superior,* and failure to recognize the real considerations of social policy which underlie it, have resulted in a confusion of treatment not only of situations where vicarious responsibility is sought to be imposed upon a master for the negligence of his servant, but also where the master himself seeks to assert a right to damages for injuries resulting from his servant's negligence. Although the social *desideratum* of affording a remedy to one injured by the negligence of the normally impecunious servant of another is not present where the master sues persons who have been concurrently negligent with his servant, courts nevertheless consider that, since the injury was caused in the course of the furtherance of the employer's purposes, his rights can rise no higher than those of his employee, and hold that the contributory negligence of the servant will bar the master from recovery from such third persons.[2] Likewise, where the person whose negligence was concurrent with that of the defendant was engaged in an enterprise with the plaintiff, in which both had such substantial interests that the courts deem it just to impose on the non-negligent [3] plaintiff vicarious liability for his associate's negligence, the contributory negligence of the joint *entrepreneur* who was at fault is held to be "imputed" to the innocent associate so as to bar his recovery.[4] Although well settled, it is apparent that this result is anomalous to orthodox tort principles, which ordinarily base the refusal to grant relief against a defendant who has been admittedly negligent only upon some *personal* fault of the plaintiff; nevertheless it may be justified as imposing upon one who is benefiting from the execution of a venture the burdens incident to it.[5] An extension of the doctrine, however, to cases in which

[1] Particularly the nebulous concept of "right to control", itself merely a conclusion, which is used as a test of "identification" so as to attribute the negligence of one person to another.

[2] Hepps v. Bessemer & L. E. R. R., 284 Pa. 479, 131 Atl. 279 (1925); Cole v. Washington Water Power Co., 119 Wash. 29, 204 Pac. 1060 (1922).

[3] In any case where the plaintiff's conduct has fallen below the standard of care required by the courts, he is barred by his personal fault rather than by virtue of the attribution of the negligence of another. As to what conduct is required of a passenger in an automobile in order that he be considered without fault see Mechem, *The Contributory Negligence of Automobile Passengers* (1930) 78 U. OF PA. L. REV. 736.

[4] TORTS RESTATEMENT (Am. L. Inst. 1933) Tentative Draft No. 10 § 30. The marked trend of recent decisions is to require a joint financial interest in the enterprise which would justify the imposition of vicarious liability on the innocent *entrepreneur* in order that there be a "joint enterprise" in which the negligence of one member will be imputed to the other. Fisher v. Johnson, 238 Ill. App. 25 (1925); Robison v. Oregon-Washington R. R. & Navig. Co., 90 Ore. 490, 176 Pac. 594 (1918). In the instant case, the defendants being joint owners of the automobile, they were both held liable, thus making the one not driving vicariously liable for the driver's negligence.

[5] Because of the mutual financial advantages to be gained by the enterprise, the possibility of injury to others in the course of executing it may be deemed to be one of the risks to be anticipated and perhaps insured against, and should not be borne by a third party whose fault was merely concurrent with that of the member of the joint enterprise. This consideration of policy is strong where recovery is sought for property damage, although where personal injuries are sued for, its weight appears to be lessened since such injuries are not normally regarded as an expectable risk of the enterprise. As to the policy involved in cases where the suit is for property damage see Reno, *Imputed Negligence in Automobile Bailments* (1933) 82 U. OF PA. L. REV. 213.

an innocent joint *entrepreneur* seeks to recover from his associate who was negligent would seem to be both undesirable and unwarranted. In such situations it is manifestly unjust to penalize the person who has not been at fault by bestowing an unearned immunity from liability upon the party whose negligence caused the injury by imputing his negligence to the former.[6] Although both are financially interested in the venture, this should not excuse the delict of one or relieve him of a duty of care to the other.[7] Where an agency relationship is involved, the master may recover from the servant for injuries sustained by virtue of the latter's negligence [8] and for indemnification when he has been held liable on *respondeat superior*.[9] Similar rights are possessed by innocent partners against an associate who has been at fault.[10] The relation between joint *entrepreneurs* is analogous to both of these and parallel rules should apply. By resorting to the reasoning that since plaintiffs were not engaged in a joint enterprise with defendants, the negligence of the latter was not a bar to their recovery, the instant court adopted an undesirable technique. Such approach leads to confusion, since no question of "imputed" negligence is involved; if there is a duty of care on the part of one joint *entrepreneur* to another and the other has not been personally contributorily negligent, liability of the one at fault should follow as a consequence of his negligence.[11]

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[6] The negligence of the driver should subject him to liability to all those injured by his fault, and the deprivation of his associate's right of action comes as a gratuity to him.

[7] A duty of care exists on the part of the driver toward an occupant of an automobile. See cases cited in 5-6 HUDDY, AUTOMOBILE LAW (9th ed. 1931) 217. As to the degree of care owed to a guest see (1926) 75 U. OF PA. L. REV. 78.

[8] Whitney v. Martine, 88 N. Y. 535 (1882); MECHEM, AGENCY (2d ed. 1914) § 1275.

[9] Smith v. Foran, 43 Conn. 244 (1875); Costa v. Yoachim, 104 La. 170, 28 So. 992 (1900). Nor can the servant get contribution or indemnity from the master when he has been held responsible to third persons for his negligence in the course of his employment. See Rumpf v. Callo, 16 La. App. 12, 15, 132 So. 763, 765 (1931).

[10] Bohrer v. Drake, 33 Minn. 408, 23 N. W. 840 (1885); Newby v. Harrell, 99 N. C. 149, 5 S. E. 284 (1888).

[11] Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925); Harber v. Graham, 105 N. J. L. 213, 143 Atl. 340; O'Brien v. Woldon, 149 Wash. 192, 270 Pac. 304 (1928). However, the driver was protected in a suit by his associate in Farthing v. Hepinstall, 243 Mich. 380, 220 N. W. 708 (1928), and in Frisorger v. Shipse, 250 Mich. 591, 230 N. W. 926 (1930). Some other courts have used the method of the instant case of allowing recovery by finding that no joint enterprise existed. Jessup v. Davis, 115 Neb. 1, 211 N. W. 190 (1926); Bolton v. Wells, 58 N. D. 286, 225 N. W. 791 (1929); Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1926).